

FEDERAL COURT OF AUSTRALIA

Mahasneh v Minister for Immigration and Border Protection [2014] FCA 1229

Citation: Mahasneh v Minister for Immigration and Border Protection [2014] FCA 1229

Parties: **AYAT ALLAH MAHASNEH v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and MIGRATION REVIEW TRIBUNAL**

File number: NSD 624 of 2014

Judge: **EDMONDS J**

Date of judgment: 20 November 2014

Catchwords: **MIGRATION** – application for extension of time and leave to appeal – appeal from judgment of Federal Circuit Court dismissing application for judicial review of decision of Migration Review Tribunal pursuant to r 44.12 of the *Federal Circuit Court Rules 2001* – whether appealable error – application refused

Legislation: *Federal Court of Australia Act 1976* (Cth) s 24(1A)
Migration Act 1958 (Cth) s 359A, Div 5 Pt 5
Migration Regulations 1994 (Cth) cl 801.221
Federal Court Rules 2011 rr 3, 5.13
Federal Circuit Court Rules 2001 r 4.12

Cases cited: *Mahasneh v Minister for Immigration & Anor* [2014] FCCA 1038 referred to
Samsung Electronics Company Ltd v Apple Inc (2011) 217 FCR 238 cited

Date of hearing: 12 November 2014

Place: Sydney

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 21

Counsel for the Applicant: The applicant appeared in person

Solicitor for the Respondents: Katherine Hooper of DLA Piper

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 624 of 2014

BETWEEN: **AYAT ALLAH MAHASNEH**
 Applicant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

JUDGE: **EDMONDS J**

DATE OF ORDER: **20 NOVEMBER 2014**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. 1. The application for an extension of time to seek leave to appeal is refused.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA
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NSD 624 of 2014

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 Applicant

AND: **MINISTER FOR IMMIGRATION AND BORDER
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 First Respondent

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JUDGE: **EDMONDS J**

DATE: **20 NOVEMBER 2014**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

1 1 This is an application for an extension of time to apply for leave to appeal from a judgment of the Federal Circuit Court of Australia (“FCC”) delivered on 21 May 2014: *Mahasneh v Minister for Immigration and Border Protection* [2014] FCCA 1038, and an application for leave to appeal from that judgment.

2 2 The learned primary judge dismissed an application for judicial review of the decision of the Migration Review Tribunal (“MRT”). The decision to dismiss the application was made pursuant to r 44.12(1)(a) of the *Federal Circuit Court Rules 2001* (Cth) (“FCC Rules”) and was, therefore, interlocutory in nature: see r 44.12(2) of the FCC Rules. Accordingly, leave to appeal from the decision is required: see s 24(1A) of the *Federal Court of Australia Act 1976* (Cth).

Background

3 3 The applicant applied for a Partner (Temporary) (Class UK) and Partner (Residence) (Class BS) visa on 18 December 2008 on the grounds of being in a spousal relationship with his sponsor, an Australian citizen. He was granted the Temporary visa on 8 October 2009.

4 The sponsor withdrew her sponsorship of the applicant, and the first respondent's department notified the applicant of this withdrawal by letter dated 30 June 2011. By letter dated 19 August 2011, the applicant submitted evidence in support of a non-judicially determined claim that he had suffered family violence by the sponsor. By further letter, dated 6 September 2011, the applicant sought to withdraw his reliance on the family violence provisions of the *Migration Regulations 1994* (Cth) ("the Regulations") and attached, *inter alia*, a statutory declaration of the sponsor.

5 A delegate of the first respondent refused the applicant's visa application on 5 December 2011. The delegate was not satisfied that the applicant and sponsor were in a genuine and continuing relationship and accordingly not satisfied the applicant was the spouse of the sponsor.

6 The applicant sought review of the delegate's decision by application to the MRT, lodged on 16 December 2011. By facsimile letter dated 27 August 2013, the applicant was invited to attend a hearing before the MRT scheduled on 15 October 2013.

7 The applicant attended a hearing before the MRT on 15 October 2013, at which determinative issues were traversed. By facsimile letter dated 30 October 2013, the MRT invited the applicant to comment or respond to information pursuant to s 359A of the *Migration Act 1958* (Cth) ("the Act"), being inconsistencies between his and the sponsor's oral evidence at the Tribunal's hearing. The applicant responded by letter dated 6 November 2013.

8 On 13 December 2013, the MRT affirmed the decision under review refusing the applicant's visa application. The MRT was not satisfied that the applicant and his sponsor were in a spousal relationship at the time of its decision and accordingly found the applicant did not satisfy cl 801.221(2)(c) of the Regulations.

Proceedings before the Federal Circuit Court

9 The applicant commenced proceedings in the FCC by application filed on 7 January 2014. The applicant relied on an amended application filed on 2 May 2014 (see [15] of the Reasons ("R") below).

10 The Court convened a hearing pursuant to r 44.12(1)(a) of the FCC Rules, on 21 May 2014. At the conclusion of that hearing, the learned primary Judge ordered, *inter*

alia, that the application be dismissed, for reason that the applicant had failed to raise an arguable case for the relief sought (see R [30]). In summary, her Honour held:

- (1) (1) It was plain that the applicant sought to take issue with the MRT's findings of fact, including the finding that the applicant was not in a genuine spousal relationship with the sponsor (at R [20] and R [29]).
- (2) (2) The MRT had complied with its procedural obligations pursuant to Div 5 of Pt 5 of the Act (her Honour referred to "Division 7 of Part 4" at R [21] and [22]), meaning to refer to "Div 4 of Pt 7", which is the Refugee Review Tribunal's equivalent procedural code, however, nothing turns on this as the substantive obligations are materially identical).
- (3) (3) It was clear from the MRT's decision record that it had considered each of the matters identified by reg 1.15A of the Regulations, in determining whether it was satisfied at the time of its decision that the parties were in a spousal relationship (at R [25]).

Application for an extension of time to seek leave to appeal

11 11 The application for an extension of time to seek leave to appeal, filed on 20 June 2014, is accompanied by an affidavit filed on 20 June 2014 annexing the applicant's draft notice of appeal. The draft notice of appeal identifies one proposed ground, as follows:

Her Honour Judge Emmett failed to consider that the Migration Review Tribunal decision that was made on 13 December 2013 was unreasonable as the Tribunal failed to consider our commitment and I believe that I have an arguable case which the Federal Court of Australia will consider.

12 12 The applicant made short oral submissions in respect of this proposed ground of appeal when his applications for an extension of time and for leave to appeal came before me for hearing.

Consideration

13 13 With respect to the grant of an extension of time, the applicant's explanation appears to be that he attempted to file in this Court a notice of appeal, on or about 12 June 2014. It is noted in this respect that the draft notice of appeal annexed to the affidavit of the applicant is dated 6 June 2014 and is file stamped 12 June 2014. The applications for an extension of time and leave to appeal and the applicant's affidavit are both dated 17 June 2014, and are file stamped 20 June 2014.

Assuming this to be the explanation for the failure to file the application for leave to appeal within time (that is, that the applicant attempted to file a notice of appeal on or about 12 June 2014), even that date is beyond the expiry of the 14 day period to apply for leave to appeal, namely, 4 June 2014 (*Federal Court Rules 2011* r 35.13).

Further, an applicant for the grant of leave to appeal must ordinarily demonstrate:

- (4) (1) That, in all the circumstances of the case, the decision is attended by sufficient doubt to warrant its being reconsidered by the Federal Court; and
- (5) (2) that substantial injustice would result if leave were refused, supposing the decision to be wrong: *Samsung Electronics Company Ltd v Apple Inc* (2011) 217 FCR 238 at [26]–[30], and the authorities there referred to.

Contrary to the only proposed ground of the applicant’s draft notice of appeal, the learned primary judge did not fail to consider that the MRT decision made on 13 December 2013 “was unreasonable as the Tribunal failed to consider our commitment”. At R [19] and [20], her Honour said:

In relation to ground 1, the applicant asserted that the MRT denied him natural justice, and its decision was neither fair nor reasonable. No particulars were provided in support of that allegation, and the applicant did not take the Court to any parts of the transcript in support of the grounds of his amended application today.

I asked the applicant in what way the MRT had denied him natural justice or was unfair or unreasonable in the conduct of its review including its decision. It was plain from the applicant’s oral submissions that his substantive complaints are that the MRT had erroneously found that he was not in a genuine spousal relationship with his wife; that the MRT had erred because it had not accepted his evidence; and that the MRT had placed undue weight on minor inconsistencies while ignoring the requirements of reg.1.15A of the Regulations in considering whether the applicant’s relationship was genuine.

The only ground of the draft notice of appeal is essentially a complaint about the same matter, namely, the factual merits of the MRT’s decision.

The MRT is required to provide a procedurally fair process in accordance with the procedural code set out in Div 5 of Pt 5 of the Act, and the learned primary Judge was correct to find no error by the MRT with respect to its procedural obligations.

The MRT made findings of fact, reasonably open to it on the evidence and material, and for the reasons given. The MRT’s reasons disclose that it considered matters

made relevant by reg 1.15A(3), and weighed up the evidence before it on each of those aspects in determining that it was not satisfied that the applicant was in a spousal relationship with the sponsor. The learned primary Judge was correct in so finding, and no error in her Honour's interlocutory dismissal of the proceedings for failure to raise an arguable case for the relief sought is otherwise demonstrated.

Conclusion

20 20 The delay is not great and if that were the only consideration, I would be inclined to grant an extension of time for the applicant to seek leave to appeal. However, I can discern no appealable error in the reasons of the learned primary judge to warrant a grant of leave to appeal and, for that reason, there would be no utility in granting an extension of time.

21 21 The application for an extension of time to seek leave to appeal is refused.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Edmonds.

Associate:

Dated: 20 November 2014